

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

BRENDA PATTERSON,
Petitioner,

vs.

McLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari for the United States
Court of Appeal for the Fourth Circuit

**BRIEF OF CAROL L. BISHARAT;
CHINESE FOR AFFIRMATIVE ACTION;
EVERETTE M. CLEVELAND;
EQUAL RIGHTS ADVOCATES, INC.;
THE CHARLES HOUSTON BAR ASSOCIATION;
THE LEGAL AID SOCIETY OF
SAN FRANCISCO/EMPLOYMENT LAW CENTER
AS AMICI CURIAE SUPPORTING
PETITIONER-BRENDA PATTERSON**

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QUESTION PRESENTED

"Whether or not the interpretation of 42 U.S.C. section 1981 adopted by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered?"

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No. 87-107

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CONSENT FOR FILING

This brief is being submitted with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

INTEREST OF AMICI CURIAE

Carol L. Bisharat is a Palestinian-American graduate of the Hastings College of the Law, University of California, who has worked on a number of employment discrimination actions for the

San Francisco Lawyers' Committee for Urban Affairs as a law student. Ms. Bisharat is vitally interested in continuing her orientation toward civil rights advocacy, and she expects to continue that advocacy on behalf of minorities in general and Arab-Americans in particular.

Everette M. Cleveland is an Afro-American who was denied the opportunity to purchase jewelry for a Christmas present because the jeweler would not activate the electric lock mechanism to allow Mr. Cleveland to gain entrance because Mr. Cleveland is an Afro-American. Mr. Cleveland has filed a suit alleging, *inter alia*, a violation of section 1981 based on this deprivation of his opportunity to purchase certain items.

Chinese for Affirmative Action is a voluntary, non-profit, membership supported civil rights organization that promotes equal employment, educational and economic opportunities for Asian Americans and other minorities. For the past 19 years, Chinese for Affirmative Action has dedicated itself to the eradication of racism for all people of color in the workplace, public life, educational institutions and in the media. In its efforts to combat racial discrimination, Chinese for Affirmative Action has depended upon this nation's commitment to equal justice through civil rights legislation and litigation to affirm the rights of all individuals in this country regardless of race, creed, sex or national origin.

Equal Rights Advocates, Inc. is a San Francisco based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a special interest in eradicating the double burden of race and sex discrimination experienced by women of color. Equal Rights Advocates, Inc. has been particularly concerned with gender equality in the work force because economic independence is fundamental to women of color's ability to gain equality in other aspects of society. This concern has been expressed through Equal Rights Advocates, Inc.'s participation, both as counsel and as *amicus*, in numerous employment discrimination cases.

The Charles Houston Bar Association is the San Francisco, Bay Area branch of the National Bar Association. It represents

over 500 black attorneys, judges and law students in Northern California. Its purposes included achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. The Association has a particular interest in this case because of its belief that all remedies should be available to eradicate racial discrimination in America.

The Legal Aid Society of San Francisco/Employment Law Center is a private non-profit public interest law firm that specializes in the litigation of employment discrimination cases. Founded in 1916 to represent individuals unable to afford legal counsel, the Legal Aid Society/Employment Law Center is dedicated to the eradication of all forms of employment discrimination. The Legal Aid Society of San Francisco/Employment Law Center was counsel of record in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). It has recently filed *amicus curiae* briefs in this Court in *California Federal Savings and Loan Association v. Guerra*, 107 S.Ct. 683 (1987); *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442 (1987); *Rotary Club of Duarte v. Board of Directors of Rotary International*, 107 S.Ct. 1940 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); and *Vinson v. Meritor Savings Bank*, 106 S.Ct. 2399 (1986).

SUMMARY OF THE ARGUMENT

The doctrine of *stare decisis* is not a doctrine that should be lightly cast aside. Precedents of this Court have established factors to be considered for determining the appropriateness of overruling or reconsidering earlier decisions. This Court in April of this year has indicated that it desires the parties to address the continuing validity of *Runyon v. McCrary*, 427 U.S. 160 (1976).

A review of the factors this Court has established as guideposts for establishing the propriety for reconsideration or overruling of previous decisions indicates that *Runyon* is well outside the standards embodied in the various factors, and therefore *Runyon* should not be overruled.

Runyon constituted no real departure from recent decisions of this Court in that it was predicated on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Additionally, Congress took no steps to indicate that *Runyon* evidenced a misapprehension of its intent concerning section 1981, and it has had a plethora of opportunities to do so. While the legislative history of this statute may not be crystal clear, there is no real indication that the Court has misconstrued the appropriate statutory meaning in its earlier decisions in *Jones* and *Runyon*. Likewise, a reversal of *Runyon* would certainly frustrate an incredible degree of reliance on the opinion including cases on remand from decisions of this Court only one term ago. Finally, there has been no indication that *Runyon* has been either an ineffective decision or one that is out of step with the times or relevant new information.

Indeed, the overruling of *Runyon* would have the disastrous effect of withdrawing a federal forum where one is still appropriate and necessary. This withdrawal of such a forum would have a devastating impact on litigation of civil rights on behalf of racial minorities covering a variety of issues. Such a rending in the fabric of civil rights law should not be undertaken.

ARGUMENT

INTRODUCTION

On April 25, 1988, this Court issued an order restoring this case, *Brenda Patterson v. McLean Credit Union*, No. 87-107, to its calendar for reargument. Additionally, the Court requested that the parties brief and argue the following question:

Whether or not the interpretation of 42 U.S.C. section 1981 adopted by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered?

In *Runyon v. McCrary*, 427 U.S. 160 (1976) this Court, relying on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) held that section 1981 prohibits private schools—that were operated commercially and open to the general white public in that they engaged in general advertising to attract their students—from

refusing to accept blacks. The statute in question in both instances, 42 U.S.C. section 1981, provides as follows:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

This brief submitted by amici herein only addresses the additional question presented by the Court in its April 25, 1988, Order.

I.

THE NECESSARY HEAVY BURDEN IMPOSED FOR THE COURT TO DISAVOW ITS DECISION IN *RUNYON V. MCCRARY* HAS NOT BEEN MET IN THIS CASE, AND THEREFORE, RECONSIDERATION OF THAT DECISION IS INAPPROPRIATE AND UNWARRANTED.

This Court has stated many times that the doctrine of *stare decisis* is one that should not be lightly cast aside. See, e.g., *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

In fact, the doctrine of *stare decisis* was very recently defined by this Court in *Vasquez v. Hillery*, *supra*, at 266 as being “[t]he means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligent manner.” The Court went on to discuss what was meant by that definition by stating that the doctrine thereby allows society to rest assured that certain legal principles would be firmly established and not subject to the changing whims of personal or popular trends. *Id.* Thus the Court reiterated the fact that legal precedent is controlling in the judicial sphere of this society rather

than people. Principle rather than personnel must be the controlling factor. These statements must be considered within the context of the present case.

In the case presently before the Court, there is nothing in constitutional or statutory jurisprudence that mandates a departure from this doctrine of *stare decisis*. Indeed, the new issue that has been placed in this case, *sua sponte*, by this Court is one that in no way fits the traditional standards that this Court has fashioned for the overruling of decisions.

In *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 695-701 (1978), this Court articulated four factors to be considered for determining whether decisions should be overruled or reconsidered. The factors discussed in *Monell* are as follows: whether the decision constituted a departure from prior decisions, whether overruling these decisions would be inconsistent with more recent expressions of congressional intent, whether overruling these decisions would frustrate legitimate reliance on these holdings, and whether the decisions in question misconstrued the meaning of the statute as revealed in the legislative history. As will be shown below, a careful analysis of these factors compels the determination that reconsideration and overruling of *Runyon* is inappropriate and unwarranted. Additionally, other considerations often considered by the Court also mandate that *Runyon v. McCrary* not be overruled.

A. The Decision In *Runyon v. McCrary* Did Not Constitute A Departure From Recent Decisions Of This Court.

Runyon was predicated on this Court's earlier opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). While it might be argued that the outcome in *Jones* was incorrect at the time, it clearly had not been reconsidered at the time of the Court's consideration of *Runyon*, some eight years later. *Amici* herein are aware of the dissents in both cases, but this Court had before it full presentations of all issues. Thus, there was nothing in *Jones* or *Runyon* that would allow one to opine that the decision in either case was a casual or incidental holding. It is also important to note that *Jones* dealt with a statute that had lain dormant for over 100 years so that there had been no recent cases construing the

statute. Earlier precedents were distinguished rather than overruled, and therefore it certainly cannot be said that there was a long line of recent precedent that allowed for straying.

Similarly, *Jones* was decided some eight years before *Runyon*, and the decision in *Jones* was made in a period that was verdant with civil rights cases. Thus, there was enormous opportunity to reject this consideration. Indeed, the situation was such that *Jones* could have been reconsidered virtually at any time, but instead it became a bedrock of civil rights law through the decision in *Runyon*.

B. Congress Has Not Seen Fit To Change Or To Challenge This Court's Interpretation of 42 U.S.C. Section 1981 In *Runyon* And Therefore Any Rehearing Of The Issue Is Unwarranted.

Considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change the Court's interpretation of its legislation. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1971); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1931) The decision of *Runyon v. McCrary*, *supra*, was decided over twelve years ago, and there has been no effort on the part of Congress to reverse the Court's determination in that action. Compare the Congressional action leading to the adoption of Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, legislatively overruling *Grove City College v. Bell*, 465 U.S. 555 (1984).

In an area as controversial as the Court's interpretation of the statutory mandates of civil rights statutes, Congress has seen fit to remedy situations where this Court has rendered decisions that Congress felt perverted its intent. See Pregnancy Discrimination Act, Pub. L. No. 95-555, section 1, 92 Stat. 2076; 42 U.S.C. section 2000e-(k) passed in response to the Court's narrow interpretation of Title VII in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). See generally, H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 6, reprinted in *U.S. Code, Cong. & Admin. News* 4749, 4751

(1978). See also 42 U.S.C. Section 1973, overturning *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

There has been no similar movement to alter the Court's determination in *Runyon*. Thus, one must be left with the impression that the Court's opinion in *Runyon* comported with Congressional interpretation of the reach of the statute. "The doctrine of *stare decisis*, weighty in any context, is especially so in matters of statutory construction. For in such cases Congress may cure any error made by the courts". *Cottrell v. Commissioner of Internal Revenue*, 628 F.2d 1127, 1131 (8th Cir. 1980).

Thus, had Congress made the determination that the Court was wrong in *Runyon*, it must have been expected to have done something to correct the Court's erring ways. Congressional inaction in response to a decision must be taken as an indication "that the interpretation of the Act then accepted has legislative approval." *United States v. Eglin J.L.E. Ry. Co.*, 298 U.S. 492, 500 (1936).

This is especially true in a situation where the Court's decisions are in a controversial area and are rendered in a period of controversy. The statutes involved in these two cases are hardly in an obscure or arcane area of federal law. Furthermore, *Jones* was decided in the 1960s when the civil rights revolution was in its heyday. A look at the circumstances surrounding Congressional silence clearly evidences that Congress has knowingly embraced this Court's interpretation of the statutes involved. And in such circumstances, the doctrine of *stare decisis* has special force. *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922, 1928-29 (1986); *Patsy v. Board of Regents*, 457 U.S. 496, 508-12 (1982).

Congress has clearly understood section 1981 to ban racial discrimination by private individuals. Congress considered amendments to Title VII of the Civil Rights Act of 1964 in 1971 and 1972. An amendment was offered during its consideration of that statute that would make Title VII the exclusive remedy for employment discrimination. This proposal was rejected both in committee and on the floor of the Senate. Senator Williams who

was the floor manager of the bill for the Senate stated the following in objecting to that proposal:

It was recently stated by the Supreme Court in the case of *Jones v. Mayer*, that these acts [including the Civil Rights Act of 1866] protect fundamental constitutional guarantees. In any case, the courts have specially held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.

118 Cong. Rec. 3371, 3372 (1972); accord S. Rep. 92-415, 92nd Cong., 1st Sess., at 24 (1971) (Existing civil rights statutes will not be undercut by according to the Equal Employment Opportunity Commission enforcement powers). See also, H.R. Rep. No. 92-238, p. 19 (1971).

An additional indication that there has been an acceptance by Congress of the propriety of this Court's decision in *Runyon* is evidenced by the inclusion of section 1981 as one of the statutes under which prevailing plaintiffs could receive attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. section 1988. That legislation was in response to this Court's decision in *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). When Congress enacted the Civil Rights Attorneys' Fees Award Act of 1976, it specifically set out certain types of cases brought under section 1981 that would support fee awards under the statute. The legislative history cited to *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) and *Tillman v. Wheaton-Haven Recreational Ass'n*, 410 U.S. 431 (1973) as two such cases.¹ See H.R. Rep. 94-1558, at 3-4; S. Rep. 94-1011, at 3-4, reprinted in 1976 U.S. Code, Cong. & Admin. News 5908, 5910.

¹ *Johnson* concerned the issue of whether an action under Title VII against a private employer would toll the running of the statute of limitations for filing an action under section 1981. *Tillman* involved racially motivated refusals to admit blacks to private recreational facilities.

Congress had the perfect opportunity to express any dissatisfaction with the holding in *Runyon* during the furor that surrounded the disputes over the denial of tax exempt status to private schools that were segregated on the basis of race. See *Bob Jones University v. United States*, 461 U.S. 574 (1982). This period would have certainly produced an indication from Congress that this Court's determination in *Runyon* was incorrect had Congress had any such concerns. However, nothing was forthcoming from Congress which certainly must be read as ratification of this Court's decision in *Runyon*.

C. The Decisions In Question Have Not Misconstrued The Meaning Of The Statute As Revealed In The Legislative History.

Reconstructing legislative history is often a doubtful task even when dealing with recent legislation. See *Piper v. Chris-Craft Industry*, 430 U.S. 1, 26 (1972). It is beyond cavil that such a task is even more difficult in the search for the meaning of the legislature for a statute over one hundred years old. Relating this component of the factors to consider with regard to overruling cases, it seems clear that where there has been recent Congressional activity in the area the doctrine of *stare decisis* has special force. See *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501, 502. It is respectfully suggested that in the present case, as in *Patsy*, the possible alteration of the impact of an important piece of Civil Rights legislation would "usurp policy judgments that the national legislature has reserved for itself." *Id.* at 508.

D. Overruling *Runyon* Would Frustrate The Considerable Legitimate Reliance On *Runyon*.

In a virtual unbroken line of cases since *Jones*, this Court has determined that sections 1981 and 1982 addressed racially discriminatory conduct by private parties or entities. In two cases that followed *Jones*, this Court determined that section 1981 encompassed private discriminatory actions.

In *Tillman v. Wheaton-Haven Recreation Ass'n*, *supra*, this Court held that the statute would be violated by the denial of visitors to a private swim club because of their race. The Court in that case determined that the operative language of both sections

1981 and 1982 was traceable to the first section of the Civil Rights Act of 1866, and therefore, there was no reason to construe them differently insofar as their applicability to private acts of discrimination. *Id.* at 439-40.

In *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), this Court considered the application of section 1981 to private discrimination in employment. After noting that there had been a plethora of circuit court decisions holding that section 1981 afforded a federal remedy against racial discrimination in private employment, the Court determined that section 1981 provides a remedy against employment discrimination on the basis of race that is independent of Title VII. *Id.* at 459, n.6.

One year later in *McDonald v. Santa Fe Trails Transportation Co.*, 427 U.S. 273 (1976), the Court determined that whites were covered by section 1981 in private employment situations. Next, in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), this Court again sanctioned the application of section 1981 to claims of private employment discrimination on the basis of race while reaffirming the decision in *Runyon*. *Id.* at 390, n.17.

As recently as last term, this Court determined, without discussion, that section 1981 applied to instances of private racial discrimination in employment. In *Goodman v. Lukens Steel Co.*, 482 U.S. ___, 107 S.Ct. 2617 (1987), the Court determined the appropriate statute of limitations for a section 1981 cause of action against a private employer. In *St. Francis College v. Al-Khazraji*, 481 U.S. ___, 107 S.Ct. 2022 (1987), the Court determined that the statute provided protection to Arabs in instances in which they had been exposed to racial discrimination by a private college.

Any cursory check of Shepard's or the data bases of Lexis or Westlaw will disclose the incredible degree to which the lower courts have relied on this Court's opinions as to the impact of section 1981 in their work and implicitly the work of the litigants before these courts. *Stare decisis* protects such settled expectations. *Vasquez v. Hillery*, *supra*.

E. There Has Been No Indication That *Runyon v. McCrary* Has Been Ineffective.

Additionally, there has been no indication that *Runyon v. McCrary* has been an ineffective or troubling decision. Indeed, no such argument was made in the case at bar; rather the issue that was first brought to this Court was whether section 1981 would be extended to cover a situation involving allegations of racial harassment in employment.² The opinion of the Fourth Circuit in this case evidenced no dissatisfaction with the proposition that this statute reached private conduct. See *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986). Instead, the court determined that 1981 did not reach "terms and conditions of employment" by finding that the reach of section 1981 was not as inclusive as that of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-2(a).

Furthermore, the use of 1981 as a major weapon in the context of employment discrimination had been accepted since even before this Court's decision in *Johnson v. Railway Express Agency, Inc.*, *supra*. See *Waters v. Wisconsin Steel Works, etc.*, 427 F.2d 476 (7th Cir. 1970). While there was some criticism initially to the Court's seminal decision in *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), there has been no widespread concern or opposition to *Runyon*; indeed, as pointed out by Justice Blackmun in *Patterson v. McLean Credit Union*, 56 USLW 3735 (1988) (Blackmun, J. dissenting), over 100 decisions of lower courts have cited to *Runyon* with approval of the relevant language determining that the reach of 1981 includes private action.

Similarly, within the last two terms, this Court has rendered opinions that reinforced the validity of the *Runyon* holding. In

² The questions presented for review were: (1) Does 42 U.S.C. 1981 encompass a claim of racial discrimination in terms and conditions of employment, including claim that petitioner was harassed because of her race? (2) Did district court err in instructing jury that in order for petitioner to prevail on her claims of discrimination in promotion she must prove that she was more qualified than white who received promotion? 56 U.S.L.W. 3204-05 (Oct. 5, 1987) The petition for *Certiorari* was granted on October 5, 1987.

Goodman v. Lukens Steel, 482 U.S. ___, 107 S.Ct. 2617 (1987), this Court determined, *inter alia*, the appropriate statute of limitation for 1981 actions within the context of an action against a privately owned steel company. Likewise in *Saint Francis College v. Al-Khazraji*, 481 U.S. ___, 107 S.Ct. 2022 (1987), this Court determined that 1981 included certain ethnic Caucasians within its broad reach in an action against a private college.³ See also, *General Building Contractors Ass'n Inc. v. Pennsylvania*, 458 U.S. 375 (1982) where this Court determined that in order to prevail in a 1981 action, one had to prove intentional discrimination. This action also involved a situation that attacked racially discriminatory procedures in the context of private conduct.

Thus, it is beyond cavil that there had been no evidencing of a lack of effectiveness or troublesome areas in *Runyon*.

F. There Has Been No Showing That There Is Some Necessity To Bring *Runyon* Into Agreement With Experience Or Newly Ascertained Facts.

There has been no showing that the decision in *Runyon* is at odds with judicial or legislative experience. Indeed, the fact that the statute reaches private conduct has not been recently an area of contention. Rather the litigated issues have been more of the procedural type, *e.g.*, what statute of limitations is appropriate for a section 1981 action, or covered substantive issues concerning questions of liability. As stated previously, there has been no carping as to the reach of section 1981 actions as to private versus state action. Compare with the experience of 42 U.S.C. section 1983, *Monroe v. Pape*, 365 U.S. 167 (1961) with *Monell, supra*.

³ The Court reached a similar holding in *Shaare Tefila Congregation v. John William Cobb*, 481 U.S. ___, 107 S.Ct. 2019 (1987) that Jews and Arabs were among the people considered to be distinct races and hence within the protection of the statute. In the lower court, the action was brought under both 1981 and 1982, but the issue determined by this court only addressed the applicability of 1982. The Court held Jewish congregation members have a cause of action under 42 U.S.C. section 1982 for anti-semitic epithets painted on a synagogue and members' cars by whites.

The focus of many of the decisions was on the types of recoveries available to those who had been subjected to the statutory prohibited behavior. Few, if any, courts questioned the explicit holding of *Runyon*.

II.

THE ERADICATION OF THE REMNANTS OF RACIAL DISCRIMINATION IS STILL A NATIONAL PRIORITY THAT MUST NOT BE STAYED BY RULINGS THAT OVERTURN LONG STANDING AUTHORITY THAT FURTHER THAT PRIORITY.

The Court's Opinion in *Runyon v. McCrary*, *supra*, constitutes part of the very important fabric of this country's laws stamping out racial discrimination. It has long been clear that discrimination is alive and well with regard to the behavior of private individuals. In the seminal case of *Bob Jones University v. United States*, 461 U.S. 574 (1983), this Court cited *Runyon* as evidence of a "fundamental national public policy against racial discrimination in education" *Ibid.* at 593-94. That policy was but one of many that this Court has stood firm on to bring about the eradication of racial discrimination root and branch. *Green v. County School Board*, 391 U.S. 430, 438 (1968); *Louisiana v. United States*, 380 U.S. 145, 154 (1967). The Court's firm stands against racial discrimination must be continued.

A. The Possible Message That Would Be Received If *Runyon* Were Overruled Would Be Damaging To The Civil Rights Aspirations Of Minorities.

The Court should be chary of withdrawing a federal forum from litigants in this most important area. Section 1981 was enacted on the force of the Thirteenth Amendment to the Constitution, one of the Civil War Amendments, and these amendments were described by this Court as "[u]nquestionably designed to condemn and forbid every distinction, however trifling, on account of race." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Racial discrimination is not something that should be considered odious solely when practiced by governments. The terrible impact of racial discrimination is not softened by the

labelling and knowledge that it has been practiced in a non-governmental arena. Humiliation and racial indignity "[i]s one of the relics of slavery which [42 U.S.C. section 1981] was enacted to eradicate." *Rodgers v. Fisher Body Division, General Motors Corp.*, 575 F. Supp. 12, 16 (W.D. Mich. 1982), citing *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974), and *Jones, supra*.

The withdrawal of a federal forum would be most inauspicious at this particular time. Presently, most Americans believe that racial and ethnic discrimination is a relic of the past and not a significant factor for the inferior conditions in which minorities find themselves. See, e.g., Reeves, *America's Choice: What It Means*, New York Times, Nov. 4, 1984, section 6 (Magazine) at 36, cols. 4-5 (quoting the editor of the *Tennessean*: "I think white Americans have reached a consensus on black America. Look, we've done enough for them. If they can make it fine. If they can't, that's their problem."); Kluegel, "If There Isn't A Problem, You Don't Need A Solution": *The Bases of Contemporary Affirmative Action Attitudes*, 28 AM. BEHAV. SCIENTIST 761, 766 (1985) (White racism can no longer be the explanation for the socioeconomic differences between blacks and whites). [Both references cited in Crenshaw, *Race, Reform, Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harvard Law Review 1331, 1348 n.66 (1988).] By subjecting what had been considered to be binding precedent to reconsideration and overruling it, this Court could be interpreted as sending the signal that it too shares this sentiment. Certainly that would constitute a disastrous setback for the enforcement of civil rights, particularly when one is confronted with the harsh realities of the conditions of minorities in this country.

In 1986, 31 percent of blacks and 27 percent of Hispanics were living in poverty, nearly three times the rate of whites. Unemployment in April, 1988, was 12.2 percent for blacks and 9.3 percent for Hispanics as compared to 4.6 percent for whites. See *One Third of a Nation*, report of Commission on Minority Participation in Education and American Life, reported in Connell, *Minority Gains Lost, Panel Says*, San Francisco Examiner, May 23, 1988 at A-1. Black median income is 57 percent of whites, a

decline of about four percentage points since the early 1970s. Bernstein, *21 Years After the Kerner Report: Three Societies, All Separate*, New York Times, February 29, 1988, B-8 col. 2. Black unemployment averaged 17 percent between 1981 and 1986, and the rate of white unemployment was 7.3 percent. National Urban League, *The State of Black America* 1986 at 15 (1986).⁴

The statistics for females of color are equally bleak. Seventy-five percent of employed Hispanic women work in the three lowest paid service occupations. See *Population Bulletin: U.S. Hispanics: Changing the Face of America*, pp. 35-36 (1983). Sixty-one percent of employed Black females were in jobs whose median weekly income place them right at the national poverty level. See Julianne Malveaux, *Lower Wage Black Women: Occupational Descriptions, Strategies for Change*. Paper prepared for the NAACP Legal Defense Fund, Inc. p. 33 (January, 1984).

Statistics speak and courts normally listen particularly in discrimination cases. *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962). While these statistics may not have direct relevance to the issue at bar, they do indicate that the battle for equality is not over. Thus, to withdraw as potent a weapon as section 1981 from the civil rights litigators' arsenal would only serve to delay the final victory for racial equality. Furthermore, more than a limited legal message would be articulated by the overruling of *Ranney*. There would also be the signal that racial equality could be viewed as having much less importance than it once had as a national policy.

This would be especially true given the fact that the Court just last term clarified the law as to the extent of the coverage of section 1981 in *Saint Francis College v. Al-Khazraji*, *supra*, and *Shaare Tefila Congregation v. Cobb*, 481 U.S. —, 107 S.Ct.

⁴ Similarly, there has been an increase in actual overt racial hostility recently. See U.S. Commission On Civil Rights, *Intimidation And Violence: Racial and Religious Bigotry In America* (1983). See also Note, *Combating Racial Violence: A Legislative Proposal*, 101 Harvard Law Review 1270 (1988).

2019 (1987).⁵ To provide for the expansion of the remedy under the statute in one term, and then to immediately retract that remedy in the next term certainly does not posit a situation where minorities can feel that their grievances will be seriously considered.⁶

B. Overruling *Ranney* Would Truly Withdraw An Important Forum For The Vindication Of Civil Rights.

Section 1981 is one of the remedial statutes presently available for redressing employment discrimination. This statute and Title VII are the primary statutory vehicles for attacking employment discrimination. By withdrawing section 1981 from the available means of attacking private employment discrimination, the Court would leave certain employees without any redress for employment discrimination based on race. Title VII covers neither establishments with fewer than 15 employees nor employers not involved in interstate commerce. Also, persons who have lost their Title VII claims for procedural reasons would no longer have recourse to section 1981.⁷

Additionally, there would be a reduction in the remedies available to one who has suffered intentional racial discrimination in employment. The great weight of authority holds that one is

⁵ Relying on *Al-Khazraji*, the Court determined that Jews as well as Arabs fell within the protection of section 1982.

⁶ The irony of the situation is grasped when one considers the following language in *Al-Khazraji*: "If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under section 1981." *Id.* at 2028. The impression that would necessarily follow at the heels of that direction is the type that our system really can not afford to absorb.

⁷ There may be a longer statute of limitations period for section 1981 actions, unlike the rather brief limitations period provided for in Title VII (Either 180 or 300 days depending on the particular state) because section 1981 derives its statute of limitations from the appropriate state tort statute of limitations. The appropriate tort statute of limitations is generally longer than those allowed in Title VII actions. See *Goodman v. Lukens Steel Co.*, *supra*.

not entitled to compensatory or punitive damages under Title VII. See, Schlei and Grossman, *Employment Discrimination Law* 1452, n.153, 154 (1983); this type of relief is available under section 1981. *Id.*⁹

1. Reconsideration Of *Runyon* Has Implications Far Beyond Employment Discrimination.

Section 1981 is not limited to areas of employment discrimination. It encompasses other areas of contractual rights.

In the years since *Runyon* was decided courts have applied 42 U.S.C. section 1981 not only to remedy employment discrimination, but to vindicate a panoply of civil rights. It is a sad comment indeed that in the years since 1976 a law enacted in 1866 has still so much vitality in remedying racial discrimination. The following cases lay testimony to just how compelling the need continues to be for a vigorous application of section 1981 in the struggle to provide equal rights for all.

In the battle for equal education, section 1981 has continued to provide an effective weapon. For example, section 1981 was held in several post-*Runyon* cases to prohibit the denial of admission to private schools because of a child's race. See *Riley v. Adirondack Southern School for Girls*, 541 F.2d 1124 (5th Cir. 1976); *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir.), *reh'g denied*, 581 F.2d 472, *cert. denied*, 434 U.S. 1063 (1978) (school's policy on non-integration prohibited by section 1981); *Darensbourg v. Dufrene*, 460 F.Supp. 662 (E.D. La. 1978) (section 1981 bans selection of children in a nursery school based

⁹ Unlike Title VII, Section 1981 does not have any exhaustion requirements and therefore an aggrieved party presently can get into court very quickly. One need not wait for the processing of his or her charge by an agency that has been notoriously slow in processing charges. See *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission*, 432 U.S. 355, 359, 369 n.24 (1977). See also Selected Testimony of Chairman of U.S. Equal Employment Opportunity Commission reported in Daily Labor Report D-1-D-3 (March 30, 1988); Age Discrimination Claim Assistance Act, Pub. L. No. 100-283 (extending the statute of limitations in cases not processed by the E.E.O.C. within the limitations period).

on racial criteria); cf. *Gonzalez v. Southern Methodist University*, 536 F.2d 1071 (5th Cir.), *reh'g denied*, *cert. denied*, 430 U.S. 987 (1977) (plaintiff stated but did not prove a cause of action under section where she alleged that she was denied admission to private law school because she is Mexican-American).

Section 1981 also requires commercial businesses to afford blacks the same treatment it affords whites. Therefore, photographing "suspicious" black customers of a bank as part of a surveillance program instituted at the behest of the police states a cause of action under section 1981. *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978). Similarly, allegations that a hospital refused to award a contract for security services to a company owned and operated by a black man fall within the ambit of section 1981. *Howard Security Services, Inc. v. The Johns Hopkins Hospital*, 516 F.Supp. 508 (D.Md. 1981). Credit companies are also prohibited from refusing credit for racially discriminatory reasons.

Indeed, the scope of section 1981 has been greatly expanded in recent years to bring many others within its protective fold. For example, section 1981 has jealously guarded rights of whites and blacks to associate with one another in private settings. In *Weaver v. Gross*, 605 F.Supp. 210 (D.D.C. 1985), the Court held that a white female bartender at an exclusive club who was allegedly discharged due to her association with a black man has standing to sue under section 1981. Similarly in *Fiedler v. Marumaco Christian Children School*, 631 F.2d 1144 (4th Cir. 1980), the expulsion of a white female student based on her relationship with a black male student was held to be remediable under section 1981.

Racial barriers to equal housing have been increasingly eliminated owing in large part to the vigorous interpretation given section 1981 in *Runyon*. Section 1981 has continued to be effective in outlawing discriminatory refusals to rent to black families. *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977). In one related case, the statute was applied to bar the dismissal of a rental secretary who refused to follow her employer's policy of racial discrimination in showing and renting apartments. *Wilkey v. Pyramid Construction Co.*, 619 F.Supp. 1453 (D.Conn. 1985).

In another case, section 1981 provided a vehicle to challenge an attempt by whites to purchase the home of a white neighbor in order to prevent the sale of the home to a black family. *Sutton v. Bloom*, 710 F.2d 1188 (6th Cir.), cert. denied, 464 U.S. 1973 (1984).

Community facilities have been made more accessible to blacks due to the application of section 1981 to private discrimination. See *Wright v. The Salisbury Club*, 632 F.2d 309 (4th Cir. 1980) (where race is the only selective criteria for membership in housing subdivision country club.)

Indeed, while the "availability of lawful means of vindicating the right to equal treatment has not eradicated discriminatory evils, . . . it does reflect a social commitment to achieving that goal." *Choudhury v. Polytechnic Institute of New York*, 735 F.2d 38, 39 (2nd Cir. 1984). That commitment is as crucial now as it was in 1976 and should not be abandoned by this Court. By overruling *Rumson*, there would be no adequate federal remedy for a large number of circumstances now covered by section 1981.⁹ Minorities would be limited to possible vindication of these

⁹ For example, amicus Cleveland was denied the opportunity to purchase jewelry at a particular jewelry store by the owner's refusal to operate the electrical lock system so that he could enter the store to make a purchase. This practice has received some notoriety in the popular press. See *New Republic*, *The Jeweler's Dilemma*, pp. 18-28 (Nov. 10, 1986). See also *Tillman v. Wheaton-Home Recreation Ass'n*, *supra*.

Ironically even the remaining damage possibilities under section 1981 would be curtailed in employment actions. This Court has determined that the Federal Government is not subject to employment actions under section 1981 in *Brown v. General Services Administration*, 425 U.S. 820 (1976). The clear weight of authority in the lower courts that have addressed the issue have determined that the Eleventh Amendment would protect the states from damage awards including back pay awards. See, *Schlei and Grossman, Employment Discrimination Law* 674 n.16 (1983).

Likewise, recovering a monetary award from the individual would be precluded under the logic of *Brandon v. Holt*, 469 U.S. 464 (1985). And the award of punitive damages against a municipality would be similarly

rights under common law theories or actions under state statutes. It is not the intent of this brief to suggest that state courts are not as able to protect the civil rights of any particular litigant, but in all likelihood, there would not be a comparable body of law approaching that presently established in the federal court system under section 1981. In the area of civil rights law, making a "federal case" out of a lawsuit loses the pejorative connotations. The Federal Courts have, in recent history, been considered to be a fortress against racial discrimination. There is something to be lost by having that fortress subjected to judicial urban renewal.

precluded under *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

CONCLUSION

For the reasons stated above, this Court should affirm its holding in *Runyon v. McCrary*.

Respectfully submitted,

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